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No. 27

In the Supreme Court of the United States

OCTOBER TERM, 1955

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE WARREN COMPANY, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court below in the instant contempt proceeding (R. 77-83)[1] is reported at 214 F. 2d 481. The opinion of the court below (R. 1-3), pursuant to which the original decree (R. 3-7) was entered, is reported at 197 F. 2d 814.

JURISDICTION

The judgment of the court below dismissing the contempt proceeding (R. 83) was entered on June

[1] The symbol "R." refers to the pages of the printed record.

30, 1954. The petition for a writ of certiorari was filed on January 7, 1955, and granted on March 7, 1955 (R. 87). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In issuing a decree enforcing an order of the National Labor Relations Board to bargain collectively with the Union, the court below rejected the Company's defense that the Union's loss of majority status following the Company's unlawful refusal to bargain constituted a bar to enforcement. Subsequently, on petition to adjudicate the Company in civil contempt for refusing to comply with the decree, the Company reiterated the defense of the Union's loss of majority. The question is whether the court below properly dismissed the contempt petition on the ground that the "different considerations" applicable to contempt proceedings validate the defense which admittedly was not a bar to a decree of enforcement.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 31-33.

STATEMENT

The relevant facts giving rise to the instant contempt proceeding are, as shown by the record and the pleadings, virtually undisputed.

A. *Events prior to the contempt proceeding*

On November 20, 1948, and thereafter, the respondent Company, asserting a doubt as to the majority status of the Union (District Lodge No. 46, International Association of Machinists), declined to recognize the Union which had been previously designated by the majority of the employees in an appropriate unit as their collective bargaining representative. Promptly after the Union's request for recognition, the Company discharged several Union adherents and soon thereafter replaced some of them with other employees. Upon learning of this situation, the Union withdrew from an agreement, previously entered into by the Company and the Union, to determine the bargaining representative of the employees by means of a Board-conducted election and filed unfair labor practice charges. Pursuant to complaint and hearing thereon, the Board, on June 30, 1950, issued a Decision and Order in which it found that the Company's discharge of the Union adherents was discriminatory within the meaning of the National Labor Relations Act, and that its refusal to recognize and bargain with the Union, not being motivated by a good faith doubt of the Union's majority status, was also violative of the Act. Accordingly, the Board directed the Company to cease and desist from its unfair labor practices, to reinstate the discharged employees with back pay, to bargain collectively with the Union upon request, and to post notices stating that it would do

so, *Matter of the Warren Company*, 90 NLRB 689.

Following the issuance of the Board's Decision and Order, the Company reinstated the discharged Union members with back pay and posted notices (R. 63-64). However, despite repeated requests by the Union for bargaining conferences, the Company met with the Union on only one occasion, September 8, 1950 (R. 9-10, 65). On that occasion the Union submitted a proposed contract, explaining its provisions. The Company took no position at this meeting with respect to the proposed contract but undertook to study the proposal and to make its position known later (R. 9, 65). Further Union requests for bargaining negotiations or for a statement of the Company's position with respect to the proposed contract were unavailing (R. 9-10, 65). Moreover, on August 6, 1951, just before the Board filed its petition for enforcement in the court below, the Company wrote the Union that of the employees originally comprising the unit found appropriate by the Board, a majority of whom had designated the Union as their bargaining representative, only two remained in the Company's employ and that the Company doubted the Union's majority status (R. 41).[2]

[2] The Company's August 6 letter stated that the original complement consisted of nine employees, one of whom was found by the Board to be a supervisor (90 NLRB, at 709). Of the remaining eight, seven had authorized the Union to represent them for purposes of collective bargaining (*ibid.*). As already noted, several of the latter had been discharged but were reinstated shortly after the Board's order of June

On the Board's petition in the court below for enforcement of its order, the Company urged that, notwithstanding the sufficiency of the evidence to support the Board's findings and order, enforcement should be denied "because the order has been obeyed in all of its provisions and, because of changed conditions not attributable to Respondent's conduct, the Union does not now represent a majority in this small unit and Respondent should not be required to bargain further with it" (R. 1-2, 197 F. 2d 814). The court below rejected these contentions on the authority of this Court's decision in *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563 (R. 2, 197 F. 2d 814), and on August 7, 1952, entered its decree enforcing the Board's order (R. 3-7).[3]

On August 26, 1952, nineteen days after the entry of the decree, the Company notified the Board and the Union that the Company had already com-

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30, 1950. By August 6, 1951, however, these and other employees were no longer in the Company's employ and the unit, according to the August 6 letter, consisted of eight employees, containing only two of the original group, both of whom had signed Union authorization cards (90 NLRB. at 709).

[3] The court below noted that the *Mexia* decision settled the doctrine that an alleged loss of majority may not be urged as a defense in an enforcement proceeding, and that the same decision expressly ruled that compliance with a Board order does not affect the right to enforcement, pointing out that the framers of the Act contemplated "that there be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings in the event a renewal of the unfair labor practices occurs after the enforcement order (R. 2, 197 F. 2d 814).

plied with all affirmative provisions of the Board order including notice-posting, reinstatement of discharged employees with back pay, and bargaining;[4] and that the Union no longer represented a majority of the employees since only two of the original group remained in the Company's employ (R. 44-45). The Company also stated that "While the Union's alleged loss of majority may not be urged as a defense in an enforcement proceeding, it can be urged as a defense in further proceedings" (R. 44).

Consistently with this position, the Company for the next several months failed to comply with repeated Union requests for a bargaining conference and/or for the submission of relevant data concerning wages and working conditions (R. 10-12, 65). Throughout its extended correspondence with the Union, the Company, while professing its willingness to meet with the Union, persisted in the position that it had already bargained with the Union and that the Union no longer represented the employees (R. 44-53). On January 19, 1953, the Company and the Union met for the second and last time. The Company took the position, confirmed in its letter of the following day (R. 55), that the Company "was in doubt as to the majority status of the Union, and for that reason hesitated to bargain with the Union on the matter of a contract"

[4] Admittedly, the only bargaining which had taken place theretofore was the meeting of September 8, 1950, prior to the entry of the enforcement decree, at which the Union submitted a proposed contract and the Company took no position (*supra*, p. 4).

(R. 11, 65). The Company asked the Union to consent to a decertification election to be conducted by the Board, and upon the Union's refusal to consent, itself filed with the Board a petition for a decertification election (R. 11-12, 65, 55). Attached to the petition was a communication to the Company from five of its employees stating that they did not want the Union to represent them and requesting that it be decertified (R. 68-69).[5] On March 4, 1953, the Board affirmed its Regional Director's dismissal of the petition on the ground that the Company had not yet complied with the requirements of the Board order enforced by the court below (R. 12, 65, 70, 72-73). A further Union request for bargaining dated May 9, 1953, failed to elicit even a reply from the Company (R. 12, 65).

Accordingly, the Board in September 1953 initiated contempt proceedings in the court below to compel compliance by the Company with the bargaining requirements of the decree (R. 7-15).[6]

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[5] This communication was dated November 3, 1952, approximately three months after the court below entered its decree enforcing the Board's bargaining order. Two of the signatories to this communication, Rieves and Smelley, were initial adherents of the Union in November 1948 when the Union initiated its prolonged and unsuccessful effort to obtain recognition and bargaining rights (R. 41; 90 NLRB 689, 699).

[6] In its petition to the court below, the Board sought relief both in civil and criminal contempt and included an allegation that, in addition to the Company's noncompliance with the bargaining requirement, the Company had also failed to comply in good faith with the notice-posting provision of the order and decree. The review now being sought, however, pertains only to the failure of the court below to grant relief in civil contempt with respect to the bargaining order.

B. *The contempt proceeding*

The Board's petition that the Company be adjudicated in contempt set forth in substance the facts recited above (R. 7-60). The Company filed its Answer to the Board's Petition, admitting the factual averments of the Board's petition, but denying its conclusions (R. 60-73). Specifically, the Company's Answer alleged that it had complied with the Board order and court decree except as to the bargaining requirement (R. 62-64, 71). In that respect, the Answer repeatedly and unequivocally admitted the Company's refusal to bargain with the Union (R. 62, 63, 64, 71).[7] However, the Answer reiterated the position the Company had taken in the court below on the petition for enforcement, *i.e.*, that the Union did not and never had represented a majority of the employees *(ibid.)*. The Answer alleged further that five out of the six employees then employed by the Company had specifically repudiated the Union; that the Union had ignored the Company's repeated requests to dem-

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[7] The only qualification, if any, to this statement is set forth in paragraph VI of the Answer (R. 67). There the Company alluded to the allegations contained in its Response to the Board's petition for enforcement in the prior proceeding to the effect that,

> Respondent complied with every portion of the Board's decree except that it did not bargain to a conclusion with the Union. It did meet with the Union and discussed the possibility of a contract. At all times Respondent was in doubt that the Union represented a majority . . .

The meeting referred to is obviously the meeting of September 8, already described (*supra*, p. 4).

onstrate its majority anew; and that the Board had dismissed the Company's petition for a decertification election (R. 62-63, 68-72). The Answer averred that under these circumstances the Company's refusal to bargain with the Union after the entry of the decree was not an unlawful act, hence the Board's petition for adjudication in contempt should be dismissed (R. 71).

On June 30, 1954, the court below entered its opinion and judgment denying the Board's petition and dismissing the contempt proceeding (R. 77-83, 214 F. 2d 481). Finding on the basis of the pleadings that the Union had lost its majority even prior to the decree of enforcement, the court below ruled that the Company's admitted refusal to bargain on that ground was warranted notwithstanding that the court had rejected the identical defense in the enforcement proceeding (R. 80-83, 214 F. 2d, at 483-485). The court below agreed that on settled authority the defense of loss of majority following an unlawful refusal to bargain could not be urged as a defense to an enforcement proceeding, but it went on to hold (R. 82, 214 F. 2d, at 485) that the considerations underlying that rule "have no application in a contempt proceeding to which entirely different considerations apply." The court below declared that "In such a proceeding the court determines for itself what order will best serve the public interest and at the same time vindicate its own decree, and it will not, in disregard of the plain language of the act, that employees are entitled to choose their own bargaining representative and

may not have one not of their own choosing forced upon them, issue a contempt order which has the effect of doing so" *(ibid.)*.[8]

SUMMARY OF ARGUMENT

It is settled law that where a union's majority status is dissipated after an employer's unlawful refusal to bargain with it, the Board can appropriately find that such conduct has undermined the status of the union and can order the employer to bargain with it for a reasonable period despite the loss of majority. The union's intervening loss of majority status is no defense to a judicial proceeding for enforcement of such a Board order.

[8] In the course of its opinion the court below recited that the Company had "made an offer to bargain with the union" (R. 81-82, 214 F. 2d, at 484); and that the Company had "complied * * * by agreeing to bargain with the union" (R. 82, 214 F. 2d, at 485). These recitations, as the Board noted in its petition for rehearing (R. 84), are patently inconsistent with the Company's express admission that it had refused to bargain with the Union and with the undisputed facts set forth above. Similarly, the statements of the court below that the Union's loss of majority was not the result of "unfair labor practices" and was "without fault" on the Company's part (R. 80, 214 F. 2d, at 483) overlook the uncontroverted fact that the Company from the beginning never remedied its unlawful refusal to bargain. The court's further statement *(ibid.)* that, in the Board's view, the order as enforced "required the respondent to bargain indefinitely" with the Union is likewise erroneous. In its petition for rehearing (R. 85), the Board expressly declared that "established legal precedents require respondent to remedy its unfair labor practice (the prior refusal to bargain with the union) by good faith bargaining with the union for a 'reasonable' period before it may challenge the union's majority status and refuse to bargain with the union on the ground that it no longer represents the employees." See n. 16, *infra*, p. 29.

Franks Bros. Co. v. National Labor Relations Board, 321 U. S. 702; *National Labor Relations Board v. Mexia Textile Mills, Inc.*, 339 U. S. 563. A contrary result, as this Court has pointed out, would enable employers to "profit from a stubborn refusal to abide by the law." *Franks Bros., supra*, at p. 705.

The court below applied the foregoing principles when it issued its decree enforcing the Board's order requiring respondent to bargain with the union despite the claim of an intervening loss of the union's majority status. Nevertheless, when the Board instituted contempt proceedings against respondent for failure to comply with the decree, the court below dismissed the proceedings on the ground that "In such proceeding the court determines for itself what order will best serve the public interest and at the same time vindicate its own decree * * *." In so doing the court misconceived its role in the statutory scheme devised by Congress to govern labor relations and overstepped the permissible boundaries of its contempt discretion.

The enforcement procedures of the Act contemplate coordinated action between the Board and the courts of appeals for the attainment of the common end, namely, to prevent and remedy unfair labor practices. "And the proper working of the scheme fashioned by Congress * * * demands that the courts quite as much as the administrative body act as Congress has required." *(National Labor Relations Board v. Bradford Dyeing As-*

sociation, 310 U. S. 318, 342-343). The statute precludes any assumption that a court discharges its responsibility under the Act when it enters a decree enforcing a Board order and that any action thereafter with respect to compelling compliance with the decree is purely a matter within its unqualified discretion. The decree, like the order it enforces, is aimed at the prevention of unfair labor practices, and so long as compliance is not forthcoming the initial decree is a nullity and the Congressional objective is frustrated.

The view of the court below that while the entry of a decree enforcing the Board's bargaining order was required by controlling law, nevertheless it was a matter wholly within the court's discretion whether it would require obedience to the decree, represents an unwarranted departure from general principles of equity jurisprudence. This Court has repeatedly held that a court does not have such limitless discretion in the application of contempt sanctions to enforce compliance with an outstanding decree. Certainly "legal discretion in such a case does not extend to a refusal to apply well-settled principles of law to a conceded state of facts." *Union Tool Co.* v. *Wilson*, 259 U.S. 107, 112. Under settled law the Board was entitled to an effective judicial decree enforcing its order requiring respondent to bargain with the union, despite any intervening loss of majority status, and the court below so recognized. The court's refusal to enforce that decree nullified it and withheld the relief which the Act requires. The enforcement

power of the court is derived from the Act, and the standard governing judicial exercise of discretion is to be found in the provisions and policy of the Act.

ARGUMENT

The Court Below Erroneously Dismissed the Board's Petition to Adjudicate Respondent in Civil Contempt for Failure to Comply With Its Decree Enforcing the Board's Bargaining Order, Where the Sole Defense Offered Was the Union's Loss of Majority Following Respondent's Unlawful Refusal to Bargain, the Identical Defense Rejected by the Court Below as a Bar to Enforcement.

Since *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, it is settled law that a union's loss of majority following an employer's unlawful refusal to bargain is no defense to a judicial proceeding for enforcement of a Board order requiring the employer to bargain with the union. *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563; cf. *Brooks* v. *National Labor Relations Board*, 348 U.S. 96. The court below expressly acknowledged this principle when it entered a decree enforcing the Board's bargaining order, notwithstanding respondent's claim of an intervening loss of majority. Nevertheless, when the Board instituted contempt proceedings upon respondent's failure to comply with the decree, the Court below ruled that the identical claim justified respondent's noncompliance.

The question presented is whether this defense, which is concededly inadequate to bar the entry

of an enforcing decree, is nonetheless adequate to afford immunity in a civil contempt proceeding for failure to comply with the terms of that decree. An affirmative answer to this question necessarily renders the initial decree a nullity since, for all practical purposes, the remedy afforded by the decree is worth little more than its sanction, contempt.[9] Hence the question presented may be phrased in other terms, namely, whether a court has discretion in a civil contempt proceeding to nullify its prior decree by withholding sanctions to compel compliance when the sole defense offered to justify noncompliance is on settled principles of law no bar to entry of the decree.

The court below predicated its dismissal of the contempt petition on two grounds. The first ground was that to compel respondent to bargain with a union which has lost its majority would defeat the statutory mandate that employees are entitled to choose their own bargaining representative and may not have one not of their own choosing forced upon them. This was the precise issue resolved in the prior enforcement proceeding, however; and, as we shall presently demonstrate, the very statement misconceives the statutory scheme and the controlling law here applicable.

[9] "It is no more than a commonplace to note that the value of a right, to a litigant, is no greater than the available remedy, and the remedy in equity is the injunction. This insight, however, should be worked to capacity, and we have not done so until we realize that the remedy, the injunction, is worth no more than its sanction, contempt." Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 Col. L. Rev. 780 (1943).

The second ground advanced by the court below was that the considerations applicable to an enforcement proceeding are entirely different from those applicable in a contempt proceeding, and that in the latter instance the court is free to determine for itself what order will best serve the public interest and at the same time vindicate its own decree. We submit that the court in this regard misconstrued the nature of its enforcement powers under the Act, and that its refusal in the contempt proceeding to apply well-settled principles of law to a conceded state of facts constituted an erroneous exercise of discretion, the standard of discretion being that defined in the Act, namely, to vindicate the rights secured

A. *The rule of law that an employer must bargain with a union which has lost its majority following the employer's unlawful refusal to bargain does not defeat the statutory mandate but fulfills it*

When the majority of the employees in an appropriate unit designates or selects a representative for purposes of collective bargaining, the Act requires that the employer bargain with the representative and with no other. *Medo Photo Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 683-684; Sections 8(a) (5) and 9(a) of the Act. Early in the history of the Act, however, problems arose as to the impact upon the employer's statutory obligation of a change in the desires of the under it.

employees with respect to their choice of a bargaining representative following the employer's unlawful refusal to bargain with their freely chosen representative. That issue was squarely presented to this Court in the *Franks Bros.* case.

There, as here, the Board had issued an order requiring the employer to bargain with a union despite the claim that following the employer's unlawful refusal to bargain, the union, as a result of turnover among the employees in the unit, no longer represented a majority.[10] There, as here, it was urged that the Board order deprived employees who desired to change their bargaining representative of their statutory right of free choice. This Court ruled, however, that where a union's majority was dissipated after an employer's unfair labor practice in refusing to bargain with it, the Board could appropriately find that such conduct had undermined the prestige of the union and could require the employer to bargain with it for a reasonable period despite the loss of majority. The consequence of a contrary approach, the Court noted, would be to enable employers to "profit from a stubborn refusal to abide by the law" (321 U.S., at p. 705).

In addressing itself to the specific contention

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[10] In *Franks Bros.*, as in the instant case, the union had filed a petition for certification but when the employer's unfair labor practices made a free election impossible, the union withdrew its petition and instituted the unfair labor practice proceeding out of which the bargaining order arose. 321 U.S., at 702-703.

that a bargaining order under such circumstances involves an injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement and, to that extent, negates the statutory guarantee of free choice. this Court, in language which is appropriate here, declared (at pp. 705-706):

> Contrary to petitioner's suggestion, this remedy, as embodied in a Board order, does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. * * * But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. * * * After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships.

In support of this holding, this Court cited, *inter alia*, the decision of the Court of Appeals for the Fourth Circuit in *Great Southern Truck-*

ing Co. v. National Labor Relations Board, 139 F. 2d 984, certiorari denied, 322 U.S. 729, a case in square conflict with the decision below.[11] In that case, which arose out of an unfair labor practice strike following a wrongful refusal to bargain (127 F. 2d 180, 184), the employer contended in the contempt proceeding that it was relieved of its obligation to bargain under the decree because the union had lost majority status since the entry of the decree; it alleged that none of the strikers who had accepted reinstatement which had been offered pursuant to the decree were still in the company's employ and that a majority of the replacement employees had signed a petition stating that they did not desire to be represented by the union (139 F. 2d, at 985). There also, as here, the Board denied a company request to redetermine the union's majority status (*ibid.*). The Fourth Circuit rejected the contention and held the employer in contempt. Citing, among

[11] See also *West Texas Utilities Co. v. National Labor Relations Board*, 206 F. 2d 442, 449, certiorari denied, 346 U.S. 885, where the Court of Appeals for the District of Columbia Circuit rejected a contention made by way of "defense and counterclaim" that because of the receipt of petitions from employees showing, allegedly, that the union no longer represented a majority of the employees, the employer should not be held in civil contempt for disregarding the court's order to bargain. Like defenses were also recently rejected by the Court of Appeals for the Tenth Circuit in two unreported contempt cases, *National Labor Relations Board v. Conover Motor Co.* and *National Labor Relations Board v. Phelps Brothers Service Co.*, both orders entered April 23, 1953, and by the Court of Appeals for the Second Circuit in an unreported contempt case, *National Labor Relations Board v. Todd Co., Inc.*, order entered June 27, 1950, certiorari denied, 340 U.S. 864.

other decisions, the First Circuit's opinion in *National Labor Relations Board* v. *Franks Bros. Co.*, 137 F. 2d 989, subsequently affirmed by this Court, 321 U.S. 702, the court noted that the company's unlawful and protracted refusal to bargain with the union "necessarily must have had a telling impact" both with respect to maintaining the Union adherence of old employees [12] and with respect to obtaining new adherents from the incoming employees. Accordingly, the court held that "Inasmuch as the Company's own unlawful conduct created an atmosphere which made normal union growth and allegiance difficult, it will not now be permitted to urge its labor turnover and ensuing loss of union majority status as the basis for avoiding compliance with the remedial bargaining provision of our decree" (139 F. 2d, at 986).

Addressing itself further to the contention, given decisive weight by the court below, that an adjudication of contempt would have the effect of imposing upon employees a representative that they had specifically repudiated, the Fourth Circuit noted that under all the circumstances such a disavowal of the union could not be regarded as "a true expression of their unhampered will. On the contrary, it rather indicates that at long last,

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[12] As already noted, in the instant case the two original adherents of the Union (Smelley and Reives) who remained in the Company's employ finally repudiated the Union in November 1952, four years after its initial demand for recognition and bargaining, two years after the Board's order, and three months after the court decree (*supra*, pp. 4, 7, n. 5.)

after five years, the Company has been able successfully to thwart the employees' attempt to bargain collectively through representatives of their own untrammeled choice" (*ibid.*). Finally, the court noted that its disposition of the case did not grant the Union a permanent status as exclusive bargaining representative for any fixed period of time (at p. 987):

> *After the conditions of free choice have been restored by collective bargaining, in good faith on the part of the Company,* then should these employees desire to be represented by some body other than the Union, they may then avail themselves of the statutory procedure of the Act itself * * * in order to guarantee that their genuine desires can be ascertained and respected. But until the Company purges itself of its unlawful conduct in violating our decree, the employees' true desires "are matters of speculation and argument." [Emphasis in original.]

The principles thus set forth in *Great Southern Trucking* and approved by this Court in *Franks Bros.* were subsequently reaffirmed in *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, and were again approved in *Brooks* v. *National Labor Relations Board*, 348 U.S. 96.[13]

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[13] The issue in *Brooks* arose in a slightly different context. There 8 of the 13 employees in an appropriate unit designated a union as their bargaining representative in a Board-con-

B. *The court below misconceived its role in the administration of the Act, and its refusal in the contempt proceeding to apply well-settled principles of law to a conceded state of facts constituted an erroneous exercise of its discretionary power.*

As already noted, the court below recognized the foregoing principles when it issued its decree enforcing the Board's bargaining order despite respondent's claim of an intervening loss of majority. The legal situation changed in no wise thereafter.[13] Nevertheless, when the Board instituted contempt proceedings for failure to comply with the decree, the court below dismissed the contempt petition on the ground that "In such a proceeding the court determines for itself what order will best serve the public interest and at the same time

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ducted election. One week after the election and one day before formal certification, 9 of the 13 employees revoked their designation. Unlike *Franks Bros.* and the instant case, the employer in *Brooks* had engaged in no unfair labor practices to which the employee defection could be attributed. Nevertheless, this Court upheld the validity of a Board order requiring the employer to bargain with the union.

[14] The observation of the court below (R. 824) to the effect that "new evidence" may be considered in a contempt proceeding, whereas in an enforcement proceeding the Board's order must be affirmed or set aside on the basis of the record before the Board while, generally speaking, a valid statement of the law, has no relevance here. As the cases cited in the preceding section establish, loss of majority following an unlawful refusal to bargain is no defense to an enforcing decree whether that loss occurs prior to or after issuance of a Board order, or prior to or after a decree of enforcement.

vindicate its own decree . . . " (R. 82). We believe that in so doing, the court misapprehended its role in the statutory scheme devised by Congress to govern labor relations and overstepped the permissible boundaries of its contempt discretion.

I. The view of the court below that, in this contempt proceeding, the court itself was the sole arbiter of the relief which was appropriate under its enforcing decree, and that it was no longer bound by the considerations which prompted enforcement of the agency order, overlooks the essential relationship between court and agency in the administrative scheme. This Court long ago observed in *United States* v. *Morgan*, 307 U.S. 183, 191 (quoted with approval in *Hecht* v. *Bowles*, 321 U.S. 321, 330-331), that in such situations,

> . . . court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action.

More specifically, this Court has delineated the kind of "coordinated action" which the Act contemplates between the Board and the courts of ap-

peals both at the enforcement and contempt stages for the "attainment of the common end." Thus, in *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U.S. 318, the Court defined the duty of the Courts of Appeals, in respect of enforcement of Board orders as follows: (at pp. 342-343):

> Congress has placed the power to administer the National Labor Relations Act in the Labor Board, subject to the supervisory powers of the Courts of Appeals as the Act sets out. If the Board has acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice * * * made findings based upon substantial evidence and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the Court of Appeals requires the court to grant enforcement of the Board's order. Until granted such enforcement, the Board is powerless to act upon the parties before it. And the proper working of the scheme fashioned by Congress to determine industrial controversies fairly and peaceably demands that the courts quite as much as the administrative body act as Congress has required.

And see *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 269-270:

> The Board seeks enforcement as a public agent, not to give effect to a "private admin-

strative remedy." Both the order and the decree are aimed at the prevention of the unfair labor practice. If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented.

The relationship between Board order and court decree in the statutory scheme precludes the assumption that a court discharges its duty under the Act when it enters an enforcing decree and that any action thereafter with respect to compelling obedience to that decree is solely a matter for its own unrestricted discretion. The authority of the court is derived from the Act, and the standard governing the exercise of its discretion is found in the provisions and policy of the Act. The reviewing court, like the Board, must take as its touchstone and objective the vindication of the rights secured by the Act. The decree, like the order it enforces, is aimed at the prevention of the unfair labor practice, the avowed objective of the Act, and so long as compliance is not forthcoming, that objective is frustrated. It is for this very reason that Congress from the beginning contemplated the judicial remedy of contempt as the ultimate sanction to secure compliance with Board orders. *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 569; H. Conf. Rep. No. 1371, 74th Cong., 1st Sess., p. 5; cf. *Maggio* v. *Zeitz*, 333 U.S. 56, 68-69.

2. Quite apart from the fact that the court below misconceived its function in the administrative

scheme of the Act, its action here is contrary to general principles of equity jurisprudence." In essence, the position of the court below is that while entry of a decree enforcing the Board order was required by controlling law, that law no longer applied with respect to compelling compliance with the decree. In the court's view, the slate was wiped clean once it entered its own decree. On this premise, the court below could properly determine for itself how to vindicate its own decree or whether to vindicate it at all. On this premise, moreover, it could properly disregard well-settled principles of substantive law otherwise applicable. If the court below is correct in this, then the Board "has won a lawsuit and lost a cause" (*International Salt Co.* v. *United States*, 332 U.S. 392, 401). Indeed, the effect of the decision below is that contrary to the decision of this Court in *Franks Bros.*, the enforcement decree in this case need not, and perhaps should not, have issued in the first place, since there are no sanctions behind it.

The view that a court has such limitless discretion in the application of contempt sanctions has repeatedly been rejected by this Court. The basic doctrine was laid in *Union Tool Co.* v. *Wilson*, 259 U.S. 107, where this Court said (at p. 112):

> In the determination of the question whether an injunction has been violated and, if so, whether compensation shall be made to the injured party, there may be occasion for the ex-

ercise of judicial discretion; but the order to be entered in such a proceeding is not exclusively or necessarily a discretionary one. [Citing cases.] Moreover, legal discretion in such a case does not extend to a refusal to apply well-settled principles of law to a conceded state of facts.

The doctrine thus enunciated was more recently applied in a contempt proceeding instituted by a federal administrative agency in *Penfield Co. v. Securities and Exchange Commission*, 330 U.S. 585. In that case, the defendant was found guilty by a district court in civil contempt for failure to comply with a court order enforcing a subpena *duces tecum* issued by the Commission in aid of an authorized investigation. The district court imposed an unconditional fine but refused to grant remedial relief designed to compel production of the subpenaed documents. On appeal to the Ninth Circuit, the court of appeals ruled that the imposition of the unconditional fine was error and directed that the defendant be imprisoned until he produced the documents (157 F. 2d 65). Affirming the decision of the court of appeals, this Court stated (330 U.S. at 590-592):

> The Act gives the Commission authority to require the production of books and records in the course of its investigations. And in absence of a basis for saying that its demand exceeds lawful limits [citation omitted], it is entitled to the aid of the court in obtaining

them. A refusal of the court to enforce its prior order for the production of the documents denies the Commission that statutory relief. * * *

* * * * * *

* * * We agree with the Circuit Court of Appeals that * * * the refusal of the District Court to grant the full remedial relief which the Act places behind the orders of the Commission was an abuse of discretion.

In the recent case of *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, a contempt proceeding instituted by the Wage and Hour Administrator for violation of a prior decree, this Court, reversing the court below, reemphasized the limitation on a court's discretion to grant or withhold remedial relief. The Court noted that (at p. 191):

> The force and vitality of judicial decrees derive from more robust sanctions. And the grant or withholding of remedial relief is not wholly discretionary with the judge * * * [citing *Union Tool, supra*]. The private or public rights that the decree sought to protect are an important measure of the remedy.

In this connection, it is appropriate to observe that, contrary to the view expressed by the court below (R. 82), "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are

involved." *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 552.

Where, as here, the only justification proffered for the admitted refusal to comply with the bargaining provision of the prior decree was an alleged loss of majority which followed upon a lawful refusal to bargain, a defense which on "well-settled principles" (*Union Tool, supra*) was not a bar to a decree of enforcement, withholding of appropriate remedial relief exceeded the allowable limits of th court's discretion. Accord: *Parker* v. *United States*, 153 F. 2d 66, 70 (C. A. 1); *Sauber* v. *Whetstone*, 199 F. 2d 520, 523 (C. A. 7).[15] "After all, no more is involved than whether what the law already condemned, the court shall forbid; and the fact that its judgment adds to existing sanctions that of punishment for contempt is not a circumstance to which a court will ordinarily lend a friendly ear." *National Labor Relations Board* v. *General Motors Corp.*, 179 F. 2d 221, 222 (C. A. 2).

The suggestion in the decision below that respondent acted "in good faith" in declining to

[15] Standards for enforcement of Board orders and for finding civil contempt may, of course, vary in other respects. Thus, compliance with a Board order, while not a bar to enforcement, would be a complete defense to a civil contempt action. These standards may not vary, however, with respect to an employer's obligation to remedy his prior wrongful refusal to bargain where the sole defense is no more than a continuation of that wrongful conduct and a renewed attempt to reap the benefits of that refusal because of the defection of union adherents which may well have been caused by such wrongful conduct. To tolerate such a procedure would truly be "to foster experimentation with disobedience" (*Maggio* v. *Zeitz*, 333 U. S. 56, 69).

bargain with the Union is answered by *Jacksonville Paper Co., supra*, where this Court declared (at p. 191):

> The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. * * * Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents.[16]

[16] The further observation of the court below (R. 81-82) that contempt would not lie "where it appears, as here, that the board, by refusing to consider or otherwise lend its assistance to the decertification petition, and not the respondent, is responsible for the situation which now exists" is wholly lacking in merit. Under *Franks Bros., supra*, the Board was under no obligation to "take steps, in recognition of changed situations which might make appropriate changed bargaining relationships" until respondent had made a good faith effort to remedy its illegal refusal to bargain with the Union. In situations comparable to the instant case, the Board holds that the only purpose of the bargaining order is to remedy the antecedent refusal to bargain and that once this purpose has been achieved the order has no further effect. Accordingly, where after the entry of a decree enforcing such an order the employer bargains in good faith for a reasonable time, the Board deems the employer's obligation under the decree to have been discharged. *Squirrel Brand Co., Inc.*, 104 NLRB 289, 290-291; *Northwestern Photo Engraving Co.*, 106 NLRB 1067, 1068-1069.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

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AUGUST 1955.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

SEC. 8(a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in

effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and

proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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